

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN GROSSMAN,

Plaintiff-Appellant,

and

FIRST UNION NATIONAL BANK,

Intervening Plaintiff,

v

LISS & ASSOCIATES, P.C.,

Defendant-Appellee,

and

ARNETHA WELLS, ARTHUR LISS, MARY
WALKER, AMERICAN INSURANCE
COMPANY, MITCHELL GROSSMAN, AERO
INN, INC., and AERO INN I, INC.,

Defendants.

UNPUBLISHED

June 16, 2009

No. 283809

Oakland Circuit Court

LC No. 1999-016225-NI

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right the entry of a judgment of no cause for action in favor of the sole defendant, Liss & Associates, P.C. (“defendant”), following a jury trial in this negligence case. We affirm.

This is the third appeal to our Court. The facts relevant to the first appeal are set forth in *Grossman v Liss & Associates, PC*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2003 (Docket No. 234322) (“*Grossman I*”). The facts relevant to the second appeal are set forth in *Grossman v Wells*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2007 (Docket No. 263634) (“*Grossman II*”).

In *Grossman I*, *supra*, slip op at p 1, plaintiff appealed the trial court's order granting summary disposition in favor of defendants, Liss & Associates, P.C. and Arthur Liss, Esquire. Whether Arnetha Wells, an employee of Liss & Associates, P.C., was acting within the scope of her employment when she allegedly notarized plaintiff's forged signature on an assignment of a mortgage at the request of plaintiff's ex-husband, Mitchell Grossman, was at issue. *Id.* at 5. This Court concluded that a genuine issue of material fact existed and reversed the trial court's order granting Liss & Associates, P.C.'s motion for summary disposition on plaintiff's respondeat superior claim. *Id.* at 7. The dismissal of plaintiff's negligent supervision claims against Liss & Associates, P.C. and Arthur Liss was affirmed, as was the order granting Liss' motion for summary disposition. *Id.* at 7-8.

In *Grossman II*, *supra*, slip op at 1, 3-4, this Court held that the trial court improperly granted a directed verdict in favor of defendant because the issue of whether Wells was acting within the scope of her employment when she allegedly "notarized plaintiff's forged signature on a document that purported to assign plaintiff's interest in commercial property to plaintiff's ex-husband, Mitchell Grossman, a former client of defendant," was a question of fact for the jury to decide. Accordingly, the matter was remanded for a new trial. *Id.* at 4.

Now on appeal, plaintiff challenges the jury instructions given by the trial court regarding the definition of "scope of employment." A party must object to a jury instruction before the jury deliberates, and must request a jury instruction before instructions are given in order to preserve a challenge to the trial court's direction of the jury on appeal. MCR 2.516(C); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). An objection to a jury instruction must include the ground for the objection, and must state specifically the matter to which the party objects. MCR 2.516(C); *Ward v Consolidated Rail Corp*, 472 Mich 77, 86 n 8; 693 NW2d 366 (2005).

Plaintiff failed to specifically object to the trial court's jury instruction defining "scope of employment." With respect to an unpreserved challenge to a jury instruction, "[f]ailure to timely and specifically object precludes appellate review absent manifest injustice." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). "Manifest injustice results where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Mina v General Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error is said to have affected substantial rights when the error affected the outcome of the case. *Id.*

Although we conclude that the trial court's instruction regarding the definition of "scope of employment" was imperfect in that the trial court indicated that the conduct must be "authorized *and* incidental" instead of "authorized *or* incidental," plaintiff cannot show that the

error affected the outcome of the case. See *Kern, supra*. The instruction does pertain to an issue in this case, but we agree with the trial court's clarifying instruction that the basic and controlling issue was whether defendant was negligent. The issue of whether Wells was acting within the scope of her employment when the wrongful act was allegedly done was incidental to the question of whether defendant was negligent.

Further, because plaintiff's own argument provided support for the jury's conclusion that defendant was not negligent, plaintiff cannot show that the allegedly erroneous instruction was outcome-determinative. In closing argument, plaintiff provided two alternate scenarios where the jury could conclude that defendant was not negligent. First, the jury could have concluded that Liss and Grossman did not have a relationship to the extent that Wells "believed she was acting within the scope of her employment." Second, the jury could have concluded that Wells did not notarize the document. Thus, plaintiff's claim that the trial court's imperfect definition of "scope of employment" affected the outcome of the case fails. See *Mina, supra* at 680-681.

Next, plaintiff argues that the trial court abused its discretion when it declined to give her proposed jury instruction setting forth factors for the jury to consider in deciding whether Wells was acting within the scope of her employment when she allegedly notarized the document at issue. We disagree.

This properly preserved challenge to the jury instructions is reviewed de novo on appeal. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions are reviewed as a whole in order to determine the presence of reversible error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A trial court's determination regarding a supplemental jury instruction is reviewed by this Court for an abuse of discretion, and this Court "will not reverse a court's decision regarding supplemental instructions unless failure to vacate the verdict would be inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008), quoting *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

In *Grossman II, supra* at 3-4, this Court set forth factors that a jury may consider in determining whether conduct is within the scope of an actor's employment. Plaintiff requested that the trial court instruct the jury with regard to these factors, but the trial court declined to do so. We conclude that the trial court did not abuse its discretion when it declined to give the supplemental jury instruction. First, the record does not reveal that plaintiff structured her argument in anticipation of the trial court providing the supplemental instruction. Cf: *Wengel v Herfert*, 189 Mich App 427, 431; 473 NW2d 741 (1991). Rather, plaintiff, during closing argument, invited the jury to consider the relationship between Liss and Grossman in determining whether Wells reasonably believed that she was acting within the scope of her employment when she notarized the document at Grossman's request. Second, in light of plaintiff's theory of liability and viewing the jury instructions as a whole, the supplemental instruction would not have enhanced the jury's ability "to decide the case intelligently, fairly and

impartially.” See *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002), quoting *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly